



# The 2010 Oil Spill: Natural Resource Damage Assessment Under the Oil Pollution Act

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## Summary

The 2010 *Deepwater Horizon* oil spill leaked an estimated 4.1 million barrels of oil into the Gulf of Mexico, damaging the waters, shores, and marshes, and the fish and wildlife that live there. The Oil Pollution Act (OPA) establishes a process for assessing the damages to those natural resources and assigning responsibility for restoration to the parties responsible. BP was named the responsible party for the spill. The Natural Resources Damage Assessment (NRDA) process allows Trustees of affected states and the federal government (and Indian tribes and foreign governments, if applicable) to determine the levels of harm and the appropriate remedies.

The types of damages that are recoverable include the cost of replacing or restoring the lost resource, the lost value of those resources if or until they are recovered, and any costs incurred in assessing the harm. Claims by individuals or businesses are not allowed, as all injuries are to the resources managed by state, federal, tribal, or foreign governments. OPA allows recovery from the responsible parties for harm resulting from response efforts, which in this case could include in situ burning, use of dispersants, and vehicle traffic on shores and marshes. The \$20 billion escrow fund set up by BP in June 2010 is not for government NRDA claims, but it can be used to reimburse individual losses of subsistence use of natural resources, primarily lost fishing opportunities, which are covered by OPA.

Under NRDA, Trustees design a recovery plan that is paid for or implemented by any responsible parties. If the responsible parties refuse to pay or cannot reach an agreement with the Trustees, the Trustees can sue the responsible party under NRDA for those damages or seek compensation from the Oil Spill Liability Trust Fund, but there is a cap of \$500 million for natural resources damage. The federal government can then seek restitution from the responsible parties for the sums taken from that fund. OPA caps liability for offshore drilling units at \$75 million for economic damages, but does not limit liability for removal costs.

Both the caps on the Oil Spill Trust Fund and on OPA have captured Congress's attention, as has Gulf restoration. H.R. 3534 would remove the OPA cap on damages for offshore facilities. It would also establish a task force to create a restoration plan within 12 months of enactment. This plan appears to be separate from the restoration plan under NRDA. However, Title V of H.R. 3534 overlaps parts of the NRDA process.

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## Introduction

Natural resources are protected by the government under a long-standing common law tradition known as the public trust doctrine, which dates back centuries before the United States was created. Under the public trust doctrine, natural resources belonging to the government are to be managed for the benefit of all. Within the United States, this means that, for the most part, management of the natural resources in the public trust falls to the states, except where a statute puts the federal government in control. For example, while wildlife management is a state responsibility, the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act all bring certain species under federal protection.

When resources in the public trust are harmed by contamination, federal, state, foreign, and tribal governments may seek compensation for damage to natural resources under certain laws. This is done in two steps: first, by assessing the harm; then, by determining how and what restoration will take place. Compensation for natural resource damage is intended to restore the natural resources to their condition before the damage and to compensate the public for the lost use of those resources. The estimated 4.1 million barrels<sup>1</sup> of oil released during the 2010 *Deepwater Horizon* oil spill have had and will continue to have an impact on the natural resources of the Gulf region.

## Statutory Authority

Natural Resource Damage Assessment and Recovery (NRDA) is authorized by several statutes, depending on the type of contamination: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);<sup>2</sup> the Clean Water Act (CWA);<sup>3</sup> the Oil Pollution Act of 1990 (OPA);<sup>4</sup> the National Marine Sanctuaries Act;<sup>5</sup> and the Park System Resources Protection Act.<sup>6</sup> Each statute allows collecting money as compensation for natural resource damages. Any recovery under these schemes must go toward restoration of injured resources. NRDA does not directly assist individuals affected by an oil spill and does not provide for punitive damages. The NRDA process for the 2010 oil spill in the Gulf of Mexico will be conducted pursuant to OPA. Accordingly, this report will only address that statute.

OPA (sometimes known as OPA 90) applies to discharges of oil into or on the navigable waters of the United States, adjoining shorelines, and the exclusive economic zone of the United States (where the BP spill was located).<sup>7</sup> It was enacted due in part to the *Exxon Valdez* spill in 1989, where liability was imposed primarily via the CWA. OPA amended the CWA and several other statutes imposing oil spill liability to create a unified oil spill liability regime, expand the

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<sup>1</sup> An estimated 4.9 million barrels (bbl) were released, but approximately 800,000 bbl were captured before spilling into the Gulf. See Official Site of the Deepwater Horizon Unified Command, at <http://www.deepwaterhorizonresponse.com/go/doc/2931/840475>.

<sup>2</sup> 42 U.S.C. § 9607(a)(4)(C).

<sup>3</sup> 33 U.S.C. § 1321(f)(5).

<sup>4</sup> 33 U.S.C. § 2702(b)(2)(A).

<sup>5</sup> 16 U.S.C. § 1436.

<sup>6</sup> 16 U.S.C. § 1911-1.

<sup>7</sup> The United States' exclusive economic zone extends to 200 nautical miles offshore; the *Deepwater Horizon* spill occurred 50 miles offshore. See 33 U.S.C. § 2701(6).

coverage of such statutes, increase liability, strengthen federal response authority, and establish a fund to ensure that claims are paid up to a stated amount. It has been held to preempt other maritime remedies.<sup>8</sup> As with the CWA, liability under OPA is strict, and joint and several.<sup>9</sup> Under OPA, each *responsible party* for an oil spill is liable for removal costs and six specified categories of economic damages.<sup>10</sup> One of these categories is natural resource damages, replacing the pre-existing natural resource damages provisions in the CWA for oil spills.<sup>11</sup> OPA defines natural resource damages as “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.”<sup>12</sup>

Natural resources are defined broadly by the act to include the following: “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.”<sup>13</sup>

The National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce oversees the NRDA process under OPA. Its regulations are found at 15 C.F.R. part 990. It also may act as a Trustee when the resources it protects are harmed, such as in this case. Currently, NOAA is involved in 13 other NRDA oil spill cases in the Gulf besides the BP spill.<sup>14</sup>

## Trustees

The governments in charge of the resources—federal, state, tribal, and foreign—are known as Trustees under NRDA. They coordinate the process of determining the extent of damages, the value of the resources, and the method(s) of restoration, including compensation amounts. They are charged with acting “on behalf of the public.”<sup>15</sup> By establishing a collaborative process for resolving liability issues, NRDA is designed to avoid litigation. According to discussion in the *Congressional Record* about OPA, “[OPA] is intended to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation.”<sup>16</sup> Litigation may be avoided altogether if the responsible parties consent to the Trustees’ plan for assessment and restoration.

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<sup>8</sup> See *In re: Settoon Towing*, No. 07-1263, 2009 WL 4730971 (E.D. La. Dec. 4, 2009); *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009).

<sup>9</sup> See *Rice v. Harken Exploration, Inc.*, 250 F.3d 264, 266 (5<sup>th</sup> Cir. 1991). OPA section 1001(17) (33 U.S.C. § 2701(17)) declares that OPA’s liability standard is the same as that in CWA section 311, the provision of that act addressing oil spills. CWA section 311, in turn, has been interpreted by courts to impose strict, joint and several, liability.

<sup>10</sup> 33 U.S.C. § 2702(b). For an overview of OPA liability in general, see CRS Report R41266, *Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties*, by James E. Nichols.

<sup>11</sup> OPA § 2002(a), 33 U.S.C. § 1321 note.

<sup>12</sup> 33 U.S.C. § 2702(b)(2)(A).

<sup>13</sup> 33 U.S.C. § 2701(20).

<sup>14</sup> NOAA, Southeast Region home page for Damage Assessment, Remediation, and Restoration Program, <http://www.darrp.noaa.gov/southeast/index.html>.

<sup>15</sup> 15 C.F.R. § 990.11.

<sup>16</sup> 135 Cong. Rec. 26943 (Nov. 2, 1989).

Additionally, OPA requires presenting NRDA claims to the responsible parties before any suit can be filed or other action taken.<sup>17</sup> This allows a chance for a pre-court settlement.

For the 2010 oil spill, the federal government Trustees include the Fish and Wildlife Service and National Park Service of the Department of the Interior and NOAA. The Federal Lead Administrative Trustee is the Department of the Interior. The state Trustees are the governors and various agencies of the states affected by the spill: Alabama, Florida, Louisiana, Mississippi, and Texas.<sup>18</sup> Indian tribes may be Trustees for affected tribal lands, but no such property has been identified as injured from the spill. No foreign governments have been affected yet, but it remains a possibility: Canada might have a claim if the habits of migratory birds are disrupted; damage to Mexican resources is a possibility.

**Table I. Trustees in Gulf NRDA Process**

(as of August 2010)

Department of the Interior	Department of Commerce	State of Louisiana	State of Mississippi	State of Alabama	State of Florida	State of Texas
U.S. Fish and Wildlife Service	National Oceanic and Atmospheric Administration	Coastal Protection and Restoration Authority	Department of Environmental Quality	Department of Conservation and Natural Resources,	Department of Environmental Protection	Parks and Wildlife Department
National Park Service		Oil Spill Coordinator's Office		Geological Survey of Alabama		General Land Office
		Department of Environmental Quality				Commission on Environmental Quality
		Department of Wildlife and Fisheries				
		Department of Natural Resources				

**Source:** Congressional Research Service based on data provided by Michael G. Jarvis, Congressional Affairs Specialist, NOAA.

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<sup>17</sup> 33 U.S.C. §§ 2713(a) and (c). This requirement has been held to be jurisdictional. See *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11<sup>th</sup> Cir.1995); *Russo v. M/T Dubai Star*, No. C 09-05158 SI, 2010 WL 1753187 (N.D. Cal. April 29, 2010); *Marathon Pipe Line Co. v. LaRoche Indus. Inc.*, 944 F. Supp. 476, 477 (E.D. La.1996); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 311 (E.D. Va. 1993); *Abundiz v. Explorer Pipeline Co.*, 2003 WL 23096018, at \*5 (N.D. Tex. Nov. 25, 2003); *Prairie Band of Potawatomi Indians v. Glacier Petroleum, Inc.*, No. Civ. A. 00-2165-CM, 2001 WL 584451 (D. Kan. May 2, 2001) (dismissing the complaint for failing to complete the requisite stages under OPA).

<sup>18</sup> NOAA, Deepwater Horizon Oil Spill, [http://www.darrp.noaa.gov/southeast/deepwater\\_horizon/index.html](http://www.darrp.noaa.gov/southeast/deepwater_horizon/index.html) (last visited July 30, 2010).

Typically, Trustees work together, forming a Trustee Council, to develop a restoration plan that addresses all of the damages to all of the Trustees' resources. These Trustees must reach consensus on the extent of damages and restoration when issuing a unified plan. The statutory obligation of each Trustee is to "develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship."<sup>19</sup> When the goal is to have one plan to address all of the impacts, which is way NOAA generally operates, the Trustees must work cooperatively to determine the magnitude and extent of injury to natural resources and create a plan to restore those injured resources to baseline (pre-spill) levels. Each state gets one vote on these issues, even if a state has multiple state agencies represented among the Trustees.

### **Do the Trustees Have to Work Together?**

Past NRDA processes have occurred on a much smaller scale with fewer Trustees. The size of the 2010 spill and the mix of Trustees may make consensus among them more difficult. Trustees have an incentive to work under the NRDA process: courts have held that no litigation may be brought under OPA unless the regulatory process is completed.<sup>20</sup> But it is not clear that they have to work together to develop one unified plan.

The act does not appear to ban the possibility of multiple, separate NRDA processes from one spill. It states only that the act will not provide double compensation for the same loss.<sup>21</sup> Section 2706(c) assigns each type of Trustee (federal, state, tribal, and foreign) the responsibility of developing its plan for the restoration of the resources it oversees, rather than requiring all the Trustees to develop just one plan for all damaged resources. This suggests that many plans would be allowed under OPA. To the extent that the damage can be cleanly divided among Trustees, this may not be problematic. However, natural resources frequently do not have political boundaries, and it is possible that different Trustees may argue the same resources belong to them. A situation where the Trustees were each acting separately could lead to a bidding war for settlement with the responsible parties. One Trustee could develop a plan for resources and obtain compensation before another Trustee could develop its plan for the same resources.

The NOAA regulations contemplate a separate process, although most of those regulations are written to describe a process where multiple Trustees create one, unified plan. The regulations provide that the Trustees may act separately where the resources can reasonably be divided.<sup>22</sup>

Congress identified these issues and recognized that separate plans may result, while indicating that cooperation was the preferred method. After acknowledging that in some cases more than one Trustee may share control over a natural resource, the House Conference Report on OPA states that "trustees should exercise joint management or control over the shared resources.... The

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<sup>19</sup> 33 U.S.C. § 2706(c)(1)(C).

<sup>20</sup> See *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235, 240 (11<sup>th</sup> Cir.1995); *Russo v. M/T Dubai Star*, No. C 09-05158 SI, 2010 WL 1753187 (N.D. Cal. April 29, 2010); *Marathon Pipe Line Co. v. LaRoche Indus. Inc.*, 944 F. Supp. 476, 477 (E.D. La.1996); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 311 (E.D. Va. 1993); *Abundiz v. Explorer Pipeline Co.*, 2003 WL 23096018, at \*5 (N.D. Tex. Nov. 25, 2003); *Prairie Band of Potawatomi Indians v. Glacier Petroleum, Inc.*, No. Civ. A. 00-2165-CM, 2001 WL 584451 (D. Kan. May 2, 2001) (dismissing the complaint for failing to complete the requisite stages under OPA).

<sup>21</sup> 33 U.S.C. § 2706(d)(3).

<sup>22</sup> 15 C.F.R. § 990.14(a)(2).



trustees should coordinate their assessments and the development of restoration plans, but [OPA] does not preclude different trustees from conducting parallel assessments and developing individual plans.”<sup>23</sup>

## **Covered Natural Resources**

The natural resources typically covered by NRDA include air, water (including ground water), soil, sediment, ocean bottom, biota (including bird, fish, and invertebrates), and habitat (for example, marshes, mangroves, mudflats, and vegetation). Of particular concern for the Gulf NRDA process are: marine mammals and sea turtles, fish and shellfish, birds, deep water habitat (for example, deepwater corals and chemosynthetic communities), intertidal and near shore subtidal habitats (including sea grasses, mud flats, oyster beds, and coral reefs), shoreline habitats (including salt marshes, beaches, and mangroves), terrestrial wildlife, and habitats (for example, alligators and terrapins). A useful discussion of the species and habitat at risk from the oil spill is available in CRS Report R41311, *The Deepwater Horizon Oil Spill: Coastal Wetland and Wildlife Impacts and Response*, by M. Lynne Corn and Claudia Copeland.

Management responsibilities for all natural resources within state territories fall to the states, except for specific resources for which the federal government has assumed responsibility by statute. For example, the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act all give the federal government control over the animals they cover. Wildlife not covered by federal statute is under state control. Waters and lands within state territory are also under state control. Waters protected by the National Marine Sanctuaries Act are under federal control, as are any federal lands such as those within the National Wildlife Refuge System, or National Parks, National Seashores, or National Recreation Areas. The federal government is also responsible for all resources beyond state territorial waters (usually three miles from shore).<sup>24</sup>

NRDA also contemplates how people enjoy common resources, but it does not compensate for individual losses—only the Trustees may collect. The services the natural resources provide, such as recreational fishing, boating, and shoreline recreation, may also be considered in the NRDA process.<sup>25</sup> For example, marshes serve as a buffer from hurricanes and fish provide a fishery to humans. However, NRDA money can only be used to restore the marsh or fishery, not to reimburse people whose houses are damaged by a hurricane or fishermen who are unable to earn a living from fishing. An exception is provided for subsistence use of resources, which is counted as a type of compensatory damage under OPA.<sup>26</sup>

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<sup>23</sup> H.Rept. 101-653, 1990 U.S.C.C.A.N. 779, 787 (1990).

<sup>24</sup> Submerged Lands Act, 43 U.S.C. § 1312. The territorial waters of Florida and Texas, however, extend to three nautical leagues (about nine miles) into the Gulf. *United States v. Louisiana, Texas, Mississippi, and Alabama*, 363 U.S. 1, 36-66 (1960) (Texas territorial waters); *United States v. Florida*, 363 U.S. 121, 129 (1960).

<sup>25</sup> NOAA, Deepwater Horizon Oil Spill, [http://www.darrp.noaa.gov/southeast/deepwater\\_horizon/index.html](http://www.darrp.noaa.gov/southeast/deepwater_horizon/index.html) (last visited July 30, 2010).

<sup>26</sup> 33 U.S.C. § 2702(b)(2)(C). *Subsistence use* is not defined within the act or regulations but is commonly defined as only that amount which is consumed by the harvester and family, and not for commercial benefit.

## Responsible Parties

The parties responsible for causing the oil spill will be responsible for NRDA damages. In the case of offshore drilling, a *responsible party* is the lessee or permittee of the area in which the facility is located.<sup>27</sup> Soon after the spill, the Coast Guard must designate the responsible parties.<sup>28</sup> The Coast Guard notified BP it was a responsible party for the spill on April 28, 2010.<sup>29</sup> The Trustees must give a written invitation to the responsible parties to participate in the NRDA process, and if the responsible parties accept, they must do so in writing.<sup>30</sup>

OPA imposes joint, several, and strict liability.<sup>31</sup> *Joint and several liability* means that where there are multiple responsible parties, each is potentially liable for the whole amount of the damages, regardless of its share of blame. (A separate action for subrogation could be brought by responsible parties to sort out reimbursement issues.<sup>32</sup>) *Strict liability* means liability is assigned regardless of fault or blame. There does not have to be a mistake, negligence, or a willful action for a party to be responsible.

## Determination of Damages

OPA states that responsible parties are liable for “removal costs and damages” that result from an incident.<sup>33</sup> *Removal* is defined by the regulations to be synonymous with *response*.<sup>34</sup> Response includes containing and removing oil, and other actions to minimize and mitigate damage.<sup>35</sup> Three measures for calculating damages are authorized by 33 U.S.C. § 2706(d). The first allows “the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources.” The second takes into account “the diminution in value of those natural resources pending restoration.” And the third allows recovery for those costs incurred in “assessing those damages.” Damages are capped under OPA unless an exception applies. For offshore facilities, a responsible party’s liability for economic damages would end at \$75 million, but would have no cap on removal costs.<sup>36</sup> Harm to natural resources is categorized as a *damage* under OPA; *removal* is separate.<sup>37</sup> Exceptions that would nullify the cap include gross negligence, willful misconduct, or violating an applicable federal regulation.<sup>38</sup>

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<sup>27</sup> *Responsible party* is further defined at 33 U.S.C. § 2701(32)(C).

<sup>28</sup> The authority of the President to designate the responsible party under 33 U.S.C. § 2714(a) was delegated to the Coast Guard via Executive Order in 1991. Exec. Order No. 12777 (56 Fed. Reg. 54757 (October 22, 1991)).

<sup>29</sup> Email communication with the author on August 26, 2010 from LTCR Thomas A. Shuler, U.S. Coast Guard Deputy Senate Liaison.

<sup>30</sup> 15 C.F.R. § 990.14(c)(1).

<sup>31</sup> In re: Settoon Towing, No. 07-1263, 2009 WL 4730971 (E.D. La. Dec. 4, 2009). S. Rep. 101-94, 1990 U.S.C.C.A.N. 722, 726 (1990) (“[this bill] explicitly extends strict, joint, and several liability for compensation of third party damages”).

<sup>32</sup> 33 U.S.C. § 2702(d)(1)(B).

<sup>33</sup> 33 U.S.C. § 2702(a).

<sup>34</sup> 15 C.F.R. § 990.30.

<sup>35</sup> 33 U.S.C. § 2701(30).

<sup>36</sup> 33 U.S.C. § 2704(a)(3).

<sup>37</sup> 33 U.S.C. § 2702(b).

<sup>38</sup> 33 U.S.C. § 2704(c)(1).

The damages section of OPA also gives the Trustees a benefit should the matter advance to trial. Under Section 2706(e)(2), if the Trustees satisfy the regulatory requirements of OPA in estimating damages, their assessment is given a rebuttable presumption of accuracy in any hearing. This means that a responsible party would have the burden of proving that the assessment is wrong, rather than the Trustees having to show that the assessment is right.

OPA provides a federal remedy for recovery of damages. Different liability may be imposed under other laws, however. For example, criminal liability for harming protected species may still be pursued.<sup>39</sup> States may have their own laws.<sup>40</sup> The statute specifically allows states to impose additional liability for oil spills and/or requirements for removal activities.<sup>41</sup>

Once money is recovered for any natural resource purpose, including to cover the costs of assessing the damages, it is deposited in a special account for the express purpose of restoring Trustees' resources.<sup>42</sup>

## How the NRDA Process Works

The NOAA regulations for OPA describe the Trustees' work as taking place in three steps: a Preassessment Phase, the Restoration Planning Phase, and the Restoration Implementation Phase.<sup>43</sup> These phases are discussed in detail below.

### Preassessment Phase

Three main activities occur in the Preassessment Phase.<sup>44</sup> First, the Trustees establish whether there is jurisdiction under OPA and whether it is appropriate to try to restore the damaged resources. Under 15 C.F.R. § 990.42, the Trustees must determine that there are injuries, that those injuries have not been remedied, and that there are feasible restoration actions available to fix the injuries. If any of those evaluations result in a negative finding, the NRDA process ends. This step involves data gathering, and the Trustees use multiple sources, including the public, to obtain the information they need.

Once injuries have been found, the Trustees complete the second step of the Preassessment Phase—preparation of a Notice of Intent to Conduct Restoration Planning Activities. This Notice is published in the *Federal Register* and also is delivered directly to the responsible parties.

The third step for the Trustees in the initial phase is to open a publicly available administrative record. The record includes the documents considered by the Trustees throughout the process. The Federal Lead Trustee (Department of the Interior in this case) will choose the physical

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<sup>39</sup> For an analysis of criminal laws related to wildlife harm, see CRS Report R41308, *The 2010 Oil Spill: Criminal Liability Under Wildlife Laws*, by Kristina Alexander.

<sup>40</sup> A Congressional Distribution Memorandum by CRS is available on Oil Spill Liability Statutes in the Gulf States. Contact the author for a copy.

<sup>41</sup> 33 U.S.C. § 2718(a).

<sup>42</sup> 33 U.S.C. § 2706(f).

<sup>43</sup> 15 C.F.R. § 990.12.

<sup>44</sup> 15 C.F.R. Subpart D.

location(s) of the record. This record stays open until the Final Restoration Plan is delivered to the responsible parties.

## **Preassessment for the 2010 Oil Spill**

The NRDA process in the Gulf is currently in the Preassessment Phase.<sup>45</sup> The Notice of Intent to Conduct Restoration Planning Activities is expected in September 2010, according to NOAA. Technical Working Groups composed of state and federal natural resource Trustees and representatives from BP's environmental consulting firm, Entrix, are gathering scientific information and are implementing baseline and post-impact field studies for multiple resource categories. Currently, the resources being assessed include marine mammals and sea turtles, fish and shellfish, birds, deep water habitat (deepwater corals and chemosynthetic communities), intertidal and near shore subtidal habitats (including sea grasses, mud flats, oyster beds, and coral reefs), shoreline habitats (beaches, salt marsh, mangroves), terrestrial wildlife and habitats, and human uses (recreational fishing, boating, and beach recreation). Samples of water, sediment, and tissues are being collected via land and ship-based sampling and aerial surveys. The Trustees will assess impacts from the response, including dispersant use at the surface and at depth.

## **Restoration Planning Phase**

Phase two focuses on designing the restoration. During this phase, known as the Restoration Planning Phase,<sup>46</sup> Trustees quantify injuries and identify possible restoration projects. In addition to identifying the nature of the harm to the resource from the oil spill, the Trustees will also evaluate harm resulting from the response actions,<sup>47</sup> such as the in situ burning, the use of dispersants, or vehicle damage to shores and marshes. These injuries are also compensable under OPA.<sup>48</sup>

Activities include field studies, data evaluation, modeling, injury assessment, and quantification of damage, either in terms of money needed to restore the resource or in terms of habitat or resource units. It is at this stage that the baseline is established. The baseline is the level the Trustees agree the resources were at prior to the injury and to which they will be restored under NRDA.<sup>49</sup> The regulations allow the Trustees to use historical data, reference data, control data, and/or data on incremental changes to establish the baseline.<sup>50</sup>

In practice, this has meant that where there are no baseline data for a certain species, the Trustees might look at a similar species to extrapolate data. It is not practical to expect to have up-to-date baseline data for every species everywhere there might be an oil spill. Instead NOAA has indicated that its practice is to identify the highest priority species and use this species as a proxy for those species for which data are not available. Another method is to establish a *guild* of species that have similar habitats, such as species of fish. Even if the impact on one species of

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<sup>45</sup> [http://www.darrp.noaa.gov/southeast/deepwater\\_horizon/index.html](http://www.darrp.noaa.gov/southeast/deepwater_horizon/index.html).

<sup>46</sup> 15 C.F.R. Subpart E.

<sup>47</sup> 15 C.F.R. § 990.51(e).

<sup>48</sup> 33 U.S.C. § 2702(a).

<sup>49</sup> See 15 C.F.R. § 990.30.

<sup>50</sup> 15 C.F.R. § 990.30.

fish in that guild is unknown, data may be gleaned for that species based on how the other fish are affected.

The goal of accumulating this information is to formulate a restoration plan that includes specific projects for remediation. This requires calculating the discounted values of the resources. Certain systems are in place from other NRDA events to help define the scope of the problem. For example, NOAA uses modeling and other procedures such as a Habitat Equivalency Analysis and Resource Equivalency Analysis to help quantify the scale of loss.

Before the restoration plan can be drafted, the Trustees assemble a panoply of restoration alternatives, which, for a cleanup on the scale of the 2010 oil spill, will include a broad range of projects directed at wildlife restoration, habitat restoration, and projects to provide for the loss of services and functions these resources provide. It is possible for the final projects to encompass five states, so the scope of the initial range will be considerable. The alternatives could include primary or compensatory restoration components, or both, provided they address specific injuries from the spill.<sup>51</sup> For an examination of the different types and methods of restoration, see “Restoration Options,” below.

Once the range of alternatives is chosen from this list, the Trustees will evaluate the alternatives and choose one as the basis of the restoration plan.<sup>52</sup> The public is involved throughout the data gathering process. The Draft Damage Assessment and Restoration Plan is submitted to the public for formal comment. Those comments are addressed within the Final Restoration Plan.

When the Final Restoration Plan involves federal resources, it must be reviewed under the National Environmental Policy Act (NEPA).<sup>53</sup> NEPA requires that major federal actions that significantly affect the human environment must be reviewed to learn the impacts of the action.<sup>54</sup> The extent of the environmental review depends on the extent of the impacts on the environment. Final Restoration Plans that have significant impacts on the human environment will result in an environmental impact statement, evaluating the impacts, alternatives to the chosen activity, possible mitigation, and involving the public in the process. Lesser impacts may mean that an environmental assessment is appropriate.

## **Restoration Implementation**

Once the Trustees have agreed on a Final Restoration Plan, they move to phase three, Restoration Implementation.<sup>55</sup> The Final Plan is presented to the responsible parties, who have 90 days to respond. If the responsible parties agree to the plan, they may enter a settlement agreement with the Trustees. This agreement outlines what restoration work will be done, who will pay for it, and how damages discovered later will be handled. The responsible parties could undertake to perform the restoration activities on their own, they could pay for others to do the work, or both.

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<sup>51</sup> 15 C.F.R. § 990.53(a)(2).

<sup>52</sup> 15 C.F.R. § 990.55.

<sup>53</sup> 42 U.S.C. § 4332.

<sup>54</sup> For more information about NEPA, please see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander.

<sup>55</sup> 15 C.F.R. Subpart F.

Where financial compensation, rather than primary restoration, is due, the responsible parties must agree to make the payments, although a schedule for funding could be negotiated.

If a responsible party does not agree to pay the damages or remediation expenses outlined in the Final Plan, the Trustees have two options. The Trustees may file suit in federal court or they may submit a claim for damages to the Oil Spill Liability Trust Fund. (See “Oil Spill Liability Trust Fund,” below, for an examination of this account.) If the Trust Fund is used, the federal government is authorized to recover any compensation paid by the fund from a responsible party.

### **NRDA Funding for the 2010 Oil Spill**

BP established a \$20 billion escrow fund targeted towards individual and business losses from the oil spill.<sup>56</sup> This fund is known as the Gulf Coast Claims Facility, which went into operation August 23, 2010.<sup>57</sup> It is not a fund for government NRDA expenses, but it will provide for reimbursement for subsistence use losses of natural resources by individuals or businesses.

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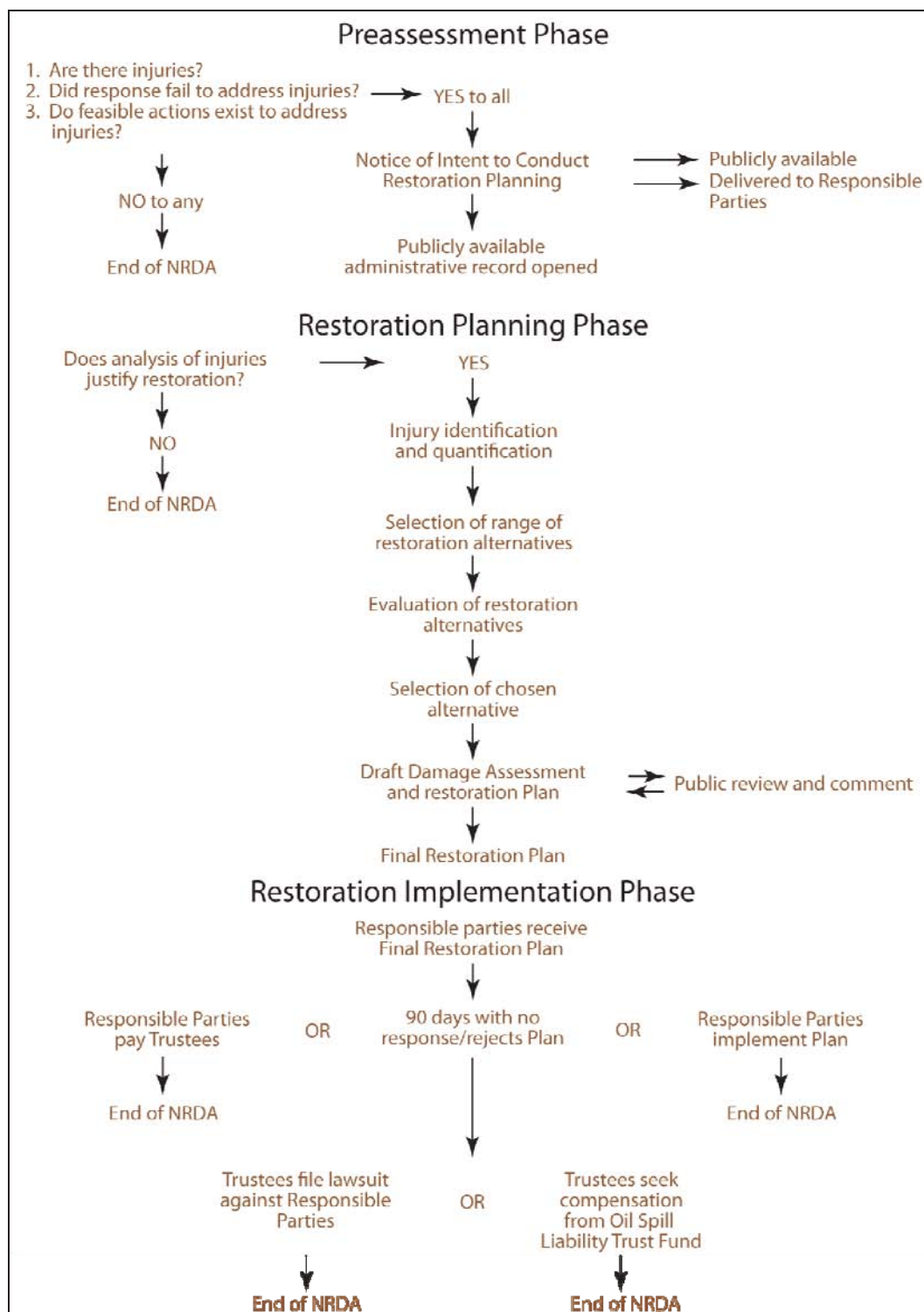
<sup>56</sup> See Gulf Coast Claims Facility, <http://www.gulfcoastclaimsfacility.com>.

<sup>57</sup> *Id.*



**Figure 1. Flow Chart of NRDA Process**

According to NOAA Regulations



**Source:** Congressional Research Service based on 15 C.F.R. Part 990.

**Note:** Preassessment Phase—15 C.F.R. §§ 990.40-990.45; Restoration Planning Phase—15 C.F.R. §§ 990.50-990.56; Restoration Implementation Phase—15 C.F.R. §§ 990.60-990.66.

## More Details About NRDA

### Restoration Options

Restoration can include restoring, replacing, rehabilitating, or acquiring the equivalent of the natural resource harmed or destroyed by the incident.<sup>58</sup> Restoring the resource where the injury occurred is called primary restoration. Allowing the injured resource to recover naturally is a type of primary restoration. However, primary restoration is not always practicable, either via natural recovery or by human cleanup. When that is the case, compensatory restoration may be needed. Compensatory restoration is an action or payment to make up for the interim or permanent loss of a resource. For example, allowing a swamp that was oiled by the spill to recover on its own may be preferred, since oiled marsh is particularly difficult to clean without causing even more harm to the area. If the marsh is allowed to recover on its own, which could take decades, the Trustees could recover compensatory damages for the loss of benefits from that marsh until it returns to its baseline condition. The money paid for this interim period could be used to clean up an area damaged by some other cause or to enhance a similar marsh.

NOAA has indicated it prefers compensatory restoration to be *in kind*, that is, to enhance a marsh to make up for an oiled marsh which cannot be restored. In kind restoration, however, is not always feasible. There may be no parallel resource. In that case, NRDA permits restoration *out of kind*. For example, one unit of near-shore habitat might be found to have similar environmental benefits as one half unit of marsh. If the damaged near-shore habitat or another near-shore habitat cannot be restored (an *in kind* restoration), then NOAA could choose, for example, to restore one half unit of marsh for every one unit of damaged near-shore habitat (*out of kind* restoration). Habitat restoration typically occurs on publicly owned lands; however, out of kind restoration can occur on private lands, if that land provides habitats for injured animals, with the owner's permission.

The Trustees could find that replacing a natural resource, rather than restoring it, makes the most sense. Oyster beds are an example of where replacing a natural resource might be suitable: if the bed is totally destroyed, the bed might be replaced with new oysters. When the resource cannot be restored and there is no similar resource nearby to restore in its place, an *equivalent* resource could be acquired. For example, if a public beach were destroyed, the Trustees could buy a private beach and make it public by providing public access. According to the House Conference Report, the priority is “to restore, rehabilitate and replace damaged resources. The alternative of acquiring equivalent resources should be chosen only when the other alternatives are not possible, or when the cost of those alternatives would, in the judgment of the trustee, be grossly disproportionate to the value of the resources involved.”<sup>59</sup>

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<sup>58</sup> 15 C.F.R. § 990.30.

<sup>59</sup> H.Rept. 101-653, 1990 U.S.C.C.A.N. 779, 786-787 (1990).



## Oil Spill Liability Trust Fund

Natural resource damages could be paid by the Oil Spill Liability Trust Fund (OS Trust Fund),<sup>60</sup> if the responsible parties refuse to accept the Final Restoration Plan and the Trustees choose not to sue. The OS Trust Fund is administered by the Coast Guard. It is financed chiefly by a per-barrel tax on crude oil produced in or imported to the United States.<sup>61</sup>

OS Trust Fund monies are available for a range of remedial and compensatory uses, even during the NRDA process.<sup>62</sup> For example, money for the Trustees' immediate assessment of the natural resource damage may come from the OS Trust Fund until the responsible parties are identified and provide reimbursement. The OS Trust Fund has limits for compensating for damaged natural resources. The OS Trust Fund could be used to pay the damages exceeding an offshore facility's liability limit under OPA (\$75 million for economic damages<sup>63</sup>), up to its per-incident cap of \$1 billion.<sup>64</sup> Only \$500 million of that amount can go towards natural resource damages, however.<sup>65</sup> The OS Trust Fund could also be used if the responsible parties are not known, insolvent, or refuse to give money for assessment before they are found responsible by a court.<sup>66</sup>

## Settlement vs. Litigation

According to NOAA, in the case of most spills, the Trustees and the responsible parties resolve the details of the restoration process via a settlement agreement. Settlement may occur at any time, provided that the terms of the settlement are adequate to satisfy the goal of OPA and are "fair, reasonable, and in the public interest."<sup>67</sup> Settling quickly after a spill may be desirable to the Trustees because the public is still engaged in the oil spill response. However, waiting longer before settling could allow a more reliable assessment of long-term effects on natural resources and a better calculation of the recovery costs.

A settlement agreement could include a provision requiring that assessment of the condition of the resources be conducted on a regular basis. A settlement could also include a reopener clause, like the one in the *Exxon Valdez* settlement. (The *Exxon Valdez* spill predated OPA, but the resolution of the resulting natural resources claims is useful as it is the closest in scale to the 2010 oil spill.) The purpose of a reopener clause is to provide a chance for Trustees to make claims years after settlement if they discover new damages to their resources from that original spill. Some have argued that the reopener clause in the Exxon settlement contained provisions that were not favorable to the Trustees.<sup>68</sup> For example, in order to make a claim under the reopener,

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<sup>60</sup> 33 U.S.C. § 2712. The standards and procedural requirements for claims filed against the OS Trust Fund are set forth in the Coast Guard's OPA regulations. See 33 C.F.R. §§ 136.1-136.241.

<sup>61</sup> 26 U.S.C. § 4611.

<sup>62</sup> For more on the OPA claims process, see CRS Report R41262, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, coordinated by Curry L. Hagerty and Jonathan L. Ramseur.

<sup>63</sup> 33 U.S.C. § 2704(a)(3).

<sup>64</sup> 26 U.S.C. § 9509(c)(2)(A)(i).

<sup>65</sup> 26 U.S.C. § 9509(c)(2)(A)(ii).

<sup>66</sup> 33 U.S.C. § 2712 (a).

<sup>67</sup> 15 C.F.R. § 990.25.

<sup>68</sup> *Assessing Natural Resource Damages Following the BP Deepwater Horizon Disaster: Hearing Before the Subcomm. on Wildlife and Water of the S. Comm. on Environment and Public Works*, 111<sup>th</sup> Cong. 6 (July 27, 2010) (written testimony of Stanley Senner, Ocean Conservancy).

any damage could not have been known or reasonably anticipated at the time of the settlement. Additionally, the *Exxon Valdez* agreement did not include any schedule for resolving claims brought under the reopener, allowing at least one claim to linger over five years with no sign of resolution.<sup>69</sup>

If settlement negotiations on the 2010 spill are unsuccessful, and the responsible parties reject the Final Restoration Plan or fail to respond within 90 days of receipt of the plan, the Trustees can file suit in federal court against the responsible parties under NRDA. NRDA claims must be filed within three years of the Final Restoration Plan.<sup>70</sup> At least one court has held that the responsible parties could demand a jury for the trial.<sup>71</sup> If the NRDA issues go to litigation, any discussions during the settlement negotiations are privileged. The court order resulting from a NRDA suit would likely outline the restoration process and who would pay for it. The responsible parties would then be legally bound to follow the order. BP may find some benefit in rejecting the Final Restoration Plan; it would delay any payment ultimately due until the court process was completed. (The final court case in the *Exxon Valdez* punitive damages was resolved by the U.S. Supreme Court 19 years after the spill,<sup>72</sup> although the company began paying natural resource damages under a settlement in the 1990s.) However, settlement offers BP the advantage of having some control over its fate—something a court case does not. Additionally, at trial BP would have the burden of *disproving* the correctness of the Trustees' Final Restoration Plan.

## Legislative Considerations

Congress has shown interest in Gulf restoration, although NRDA recovery under OPA has not been specifically addressed. The House passed H.R. 3534, which, in Title V, proposes the formation of a Gulf of Mexico Restoration Program.<sup>73</sup> The program appears similar to the NRDA process: it would create a task force comprising the governors of Gulf states and heads of appropriate agencies. The task force would develop strategies for restoring natural resources in the Gulf and issue reports every five years. H.R. 3534 would also require the Secretary of the Interior to organize baseline studies for the Gulf region.<sup>74</sup> It appears that the process proposed in Title V of H.R. 3534 would overlap with NRDA. It is unclear if this is intended to preempt the NRDA process or provide a parallel, perhaps redundant, system. Section 701 of H.R. 3534 would eliminate the \$75 million liability cap for offshore facilities.

Some issues relevant to NRDA before Congress are

- requiring better, ongoing baseline data collection for use in assessing future spills;
- allowing NRDA money to be used for research and development and advance planning of NRDA implementation;

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<sup>69</sup> *Id.*

<sup>70</sup> 33 U.S.C. § 2717(f)(1)(B).

<sup>71</sup> *United States v. Viking Resources, Inc.*, 607 F. Supp. 2d 808 (S.D. Tex. 2009).

<sup>72</sup> *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

<sup>73</sup> H.R. 3534, Tit. V (111<sup>th</sup>) (as passed by House, July 30, 2010).

<sup>74</sup> H.R. 3534, 111<sup>th</sup> Cong. § 224 (as passed by House, July 30, 2010).

- calling for long-term, comprehensive ecological studies of the effects of oil spills, e.g., 20 years later there is still oil on the beaches of Prince William Sound from the Exxon spill, and researchers continue to learn about the effects of the spill on various fish and birds;<sup>75</sup>
- codifying the terms of a potential settlement between BP and the Trustees, akin to the settlement relating to the San Joaquin River;<sup>76</sup>
- prohibiting responsible parties from “buying up” experts.<sup>77</sup>

## Conclusion

The NRDA process has been successful in the past, but it has never been tested on such a large a scale as the 2010 Gulf oil spill. More oil was spilled, a greater geographic area is involved, and more Trustees are affected than in past spills. The Trustees may have difficulty agreeing on the assessment of damages, baseline conditions, the value of the damaged resources, and the proper method of restoring them. If a unified restoration plan is sought, the Trustees must make unanimous decisions on these issues, and then BP has the option not to accept the Final Restoration Plan. If BP rejects the Trustees’ Plan, the Trustees may sue BP under NRDA for resolution of these issues, extending the final conclusion—restoration of the natural resources—even further.

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<sup>75</sup> *Assessing Natural Resource Damages Following the BP Deepwater Horizon Disaster: Hearing Before the Subcomm. on Wildlife and Water of the S. Comm. on Environment and Public Works*, 111<sup>th</sup> Cong. 5 (2010) (written testimony of Stanley Senner, Ocean Conservancy).

<sup>76</sup> P.L. 111-11, Tit. X.

<sup>77</sup> Mark Tran, *BP Denies “Buying Silence” of Oil Spill Scientists*, *The Guardian* (July 23, 2010) available at <http://www.guardian.co.uk/environment/2010/jul/23/bp-oil-spill-scientists-silence>.